IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ALYSSA CARTON,

Plaintiff,

vs. No. 1:17-cv-00218-LF-KBM

CIRCLE K STORES, INC.,

Defendant.

DEFENDANT'S ANSWER TO COMPLAINT

COMES NOW Defendant, Circle K Stores, Inc. ("Circle K" or "Defendant"), by and through its undersigned counsel, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., and local counsel Butt Thornton & Baehr PC (Agnes Fuentevilla Padilla), and for its Answer to Plaintiff's Complaint ("Complaint") (Dkt. #1), states as follows:

JURISDICTION AND VENUE

1. The allegations in Paragraph 1 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, Defendant admits it owns and/or operates a business at 13401 Lomas Blvd. NE, Albuquerque, New Mexico 87112.

2. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of the Complaint and therefore denies the same.

3. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of the Complaint and therefore denies the same.

4. In response to the allegations in Paragraph 4 of the Complaint, Defendant admits this Court has jurisdiction over the subject matter of Plaintiff's claims as alleged in the Complaint, but Defendant denies Plaintiff's claims have any merit.

5. In response to the allegations in Paragraph 5 of the Complaint, Defendant admits this Court is the proper venue for Plaintiff's claims as alleged, but denies Plaintiff's claims have any merit.

STANDING

6. The allegations in Paragraph 6 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, Defendant denies the allegations in Paragraph 6 of the Complaint and expressly denies it has violated or continues to violate the ADA.

7. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 7 of the Complaint and therefore denies the same.

8. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint and therefore denies the same.

9. In response to the allegations in Paragraph 9 of the Complaint, Defendant admits it offers goods and services to the public but lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 9 of the Complaint and therefore denies the same.

10. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 10 of the Complaint and therefore denies the same.

11. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of the Complaint and therefore denies the same.

12. Defendant denies the allegations in Paragraph 12 of the Complaint.

13. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 13 of the Complaint and therefore denies the same.

14. Defendant denies the allegations in Paragraph 14 of the Complaint.

15. Defendant denies the allegations in Paragraph 15 of the Complaint.

THE ADA AND ITS IMPLEMENTING REGULATIONS

16. The allegations in Paragraph 16 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

17. The allegations in Paragraph 17 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

18. The allegations in Paragraph 18 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

19. The allegations in Paragraph 19 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and

other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

20. The allegations in Paragraph 20 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

21. The allegations in Paragraph 21 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

22. The allegations in Paragraph 22 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

23. The allegations in Paragraph 23 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

24. The allegations in Paragraph 24 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

25. The allegations in Paragraph 25 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

26. The allegations in Paragraph 26 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

27. The allegations in Paragraph 27 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

28. The allegations in Paragraph 28 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same.

29. The allegations in Paragraph 29 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, Defendant denies the allegations in Paragraph 29 of the Complaint.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

30. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 30 of the Complaint and therefore denies the same.

31. The allegations in Paragraph 31 of the Complaint and its subparts a-b call for legal conclusions to which no answer is required. To the extent an answer is required, Defendant denies the allegations in Paragraph 31 and its subparts a-b of the Complaint.

32. In response to the allegations contained in Paragraph 32 of the Complaint, Defendant denies Plaintiff was denied full and equal access or enjoyment of the facilities, services, goods, or amenities within the premises. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 3 of the Complaint and therefore denies the same.

33. Defendant denies the allegations in Paragraph 33 of the Complaint.

34. Defendant denies the allegations in Paragraph 34 of the Complaint.

35. The allegations in Paragraph 35 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statutes, regulations and other documents referenced in this paragraph speak for themselves and Defendant denies any inconsistent characterization of the same. Defendant expressly denies the Plaintiff is entitled to any declaratory or injunctive relief.

COUNT ONE: VIOLATION OF TITLE III OF ADA

36. In response to Paragraph 36 of the Complaint, Defendant incorporates by reference herein all the answers, defenses, responses, denials, and averments to all allegations contained within Paragraphs 1 through 35 of the Complaint.

37. The allegations in Paragraph 37 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statute referenced in this paragraph speaks for itself and Defendant denies any inconsistent characterization of the same.

38. The allegations in Paragraph 38 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statute referenced in this paragraph speaks for itself and Defendant denies any inconsistent characterization of the same.

39. The allegations in Paragraph 39 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, Defendant denies the allegations in Paragraph 39 of the Complaint.

40. Defendant denies the allegations in Paragraph 40 of the Complaint.

41. In response to Paragraph 41 of the Complaint, Defendant states that Plaintiff's claims are, or will become moot, in that Defendant has either removed, or will remove, any barriers to access identified in the Complaint to the extent it is required to do so under the ADA and that such barrier removal is readily achievable and technically feasible.

42. Defendant denies the allegations in Paragraph 42 of the Complaint.

43. The allegations in Paragraph 43 of the Complaint call for a legal conclusion to which no answer is required. To the extent an answer is required, the statute referenced in this paragraph speaks for itself and Defendant denies any inconsistent characterization of the same.

RELIEF

44. Defendant denies the allegations in Paragraph 44 of the Complaint.

45. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 45 of the Complaint and therefore denies the same. Defendant expressly denies that it violates the ADA.

46. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 46 of the Complaint and therefore denies the same.

47. Defendant denies the allegations in Paragraph 47 of the Complaint.

Defendant denies that Plaintiff is entitled to any of the relief sought in the unnumbered "WHEREFORE" paragraph immediately following Paragraph 47 of the Complaint, including subparts (A) through (E) thereto.

Defendant expressly denies each and every allegation not specifically admitted herein.

DEMAND FOR JURY TRIAL

Defendant acknowledges that Plaintiff has requested a trial by jury. Defendant disputes that Plaintiff is entitled to a jury trial, as the remedies afforded by the ADA are equitable in nature.

AFFIRMATIVE DEFENSES

1. As a separate and alternative affirmative defense, Defendant states that Plaintiff is not entitled to the injunctive relief she seeks because she lacks standing to seek or receive such relief.

2. As a separate and alternative affirmative defense, Defendant states that Plaintiff failed to state a claim upon which relief can be granted, and failed to meet the strict Federal Court pleading requirements as specified in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) and *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544 (2007).

3. As a separate and alternative affirmative defense, Defendant states that at all times relevant to this suit, Defendant's actions were in good faith and it had reasonable ground for believing those actions were not in violation of any law.

4. As a separate and alternative affirmative defense, Defendant states that accessibility is provided, may impose an undue hardship, may not be readily achievable, may be prevented by architectural and other factors, may be technically infeasible, or may not otherwise be required.

5. As a separate and alternative affirmative defense, Defendant states that *de minimis* violations of federal regulations are not actionable or enjoinable.

6. As a separate and alternative affirmative defense, Defendant states that the statute of limitations may bar Plaintiff's claims, pending discovery of additional facts and evidence from Plaintiff.

7. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims are, or will become moot, in that Defendant has either removed, or will remove, any barrier to access identified in the Complaint to the extent it is required to do so under the ADA and that such barrier removal is readily achievable and technically feasible.

8. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims are barred by laches, course of conduct, estoppel, and/or waiver.

9. As a separate and alternative affirmative defense, Defendant states that the Complaint and the purported causes of action alleged in the Complaint are barred because the barrier removal Plaintiff seeks under the ADA is not "readily achievable," or easily accomplished and able to be carried out without much difficulty or expense when taking into account the cost of remediation, Defendant's financial resources, and the impact on Defendant's operations.

10. As a separate and alternative affirmative defense, Defendant states that the Complaint and all purported causes of action alleged in the Complaint are barred by Defendant's good faith reliance upon reasonable interpretations of federal law.

11. As a separate and alternative affirmative defense, Defendant states that the Complaint and all purported causes of action alleged in the Complaint are barred to the extent the alleged violations of law are excused, exempted, or justified under the statutes under which Plaintiff has sued.

12. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims against Defendant are barred to the extent that, with respect to any particular architectural element of the premises that departs from accessibility guidelines, the store has provided "equivalent facilitation" in the form of alternative designs and technologies that provide substantially equivalent or greater access to and usability of the facility.

13. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims against Defendant are barred to the extent that removal of the alleged barriers would fundamentally alter the nature of Defendant's store.

14. As a separate and alternative affirmative defense, Defendant states that Plaintiff's prayer for damages and injunctive relief are barred to the extent the claimed violations are "*de minimis*" and non-actionable because they do not materially impair Plaintiff's use of an area for an intended purpose.

15. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims against Defendant are barred to the extent she relies on an alleged barrier

where the extent of any alleged variance from the applicable regulations and standards does not exceed the range of allowable construction tolerance at the time of construction.

16. As a separate and alternative affirmative defense, Defendant states that Plaintiff lacks standing to challenge the barriers at a location she did not visit prior to the filing of the Complaint and/or to a location to which she is unlikely to return.

17. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims are barred because there was no "alteration" within the meaning of the ADA that triggered an obligation to make the modifications that Plaintiff seeks and/or, to the extent there was "alteration," the modifications sought were either not triggered by the "alteration," or were triggered, but cost in excess of 20% of the overall cost of the entire "alteration."

18. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims that the store was designed in violation of the ADA are barred to the extent that the facility, or a particular element or feature of the facility that has been put at issue, was designed and constructed prior to the effective date of the relevant portion of the ADA o its regulations.

19. As a separate and alternative affirmative defense, Defendant states that Plaintiff has failed to mitigate or to reasonably attempt to mitigate her damages, if any, particularly to the extent Plaintiff was aware of any alleged barriers to access and failed to use alternative accessible accommodations and/or means of access and to the extent Plaintiff alleges multiple claims for the same accessibility violation on different occasions and failed to alter her conduct.

20. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims against Defendant are barred to the extent that they interfere with Defendant's compliance with laws and regulations that are equally applicable to all persons.

21. As a separate and alternative affirmative defense, Defendant states that Plaintiff's claims for damages in the Complaint against Defendant are barred in whole or in part because Plaintiff's injury or injuries, if any, was/were caused by third parties acting outside the scope of agency, employment or control of Defendant.

22. As a separate and alternative affirmative defense, Defendant states that Plaintiff has not been denied full and equal access to the benefits, accommodations, and services offered by the subject facility and/or facilities.

23. As a separate and alternative affirmative defense, Defendant states that Plaintiff may have unclean hands, barring equitable remedies, or may have an improper purpose in filing this action. Plaintiff's claims are barred by the doctrine of unclean hands by reason of Plaintiff's conduct and actions, and her pattern and practice of visiting places of public accommodations without the intent of accessing goods and services and instead with the purpose of filing lawsuits, such as this current action, and incurring damages. Thus, Plaintiff's primary motive in filing this action may be the generation of damages, attorneys' fees and expert witness payments.

24. As a separate and alternative affirmative defense, Defendant states that Plaintiff is not entitled to recover attorney's fees from Defendant as alleged in the Complaint. In the alternative, to the extent that Plaintiff is entitled to recover attorneys' fees or costs, such fees

and costs are barred on the ground and to the extent that they were not reasonably incurred or were incurred at an excessive rate.

Defendant reserves the right to designate additional defenses as they become apparent through the course of discovery, investigation and otherwise.

WHEREFORE, Defendant having fully answered and responded to the allegations contained in Plaintiff's Complaint, hereby prays that:

1. Each of Plaintiff's claims be dismissed with prejudice in their entirety.

2. Each and every prayer for relief contained in the Complaint be denied.

3. Judgment be entered in favor of Defendant.

4. All costs, including attorneys' fees, be awarded to Defendant and against Plaintiff pursuant to applicable law; and

5. Defendant be granted such other and further relief as this Court may deem just and proper.

Respectfully submitted,

BUTT THORNTON & BAEHR PC

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Attorneys for Defendant
Circle K Stores, Inc.

I HEREBY CERTIFY that on the 18th day of April, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Sharon E. Pomeranz, Esq.
sharon@newmexicoada.com

/s/ *Agnes Fuentevilla Padilla*